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8 UNITED STATES DISTRICT COURT

9 CENTRAL DISTRICT OF CALIFORNIA

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11 RISO, INC., a Massachusetts) Case No. CV 13-09351 DDP (JCGx)
corporation,)
12 Plaintiff,) **ORDER DENYING PLAINTIFF'S MOTION**
13) **TO COMPEL ARBITRATION**
14 v.) [Dkt. No. 6]
15 WITT COMPANY, an Oregon)
corporation,)
16 Defendant.)

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18 Presently before the court is Defendant Witt Company
19 ("Witt")'s Motion to Dismiss Plaintiff's Complaint. (Dkt. No. 6.)
20 Having considered the submissions of the parties and heard oral
21 argument, the court denies the motion and adopts the following
22 order.

23 **I. Background**

24 RISO manufactures and distributes printing and duplicating
25 hardware and supplies. (Complaint, Ex 3. at 3.) Witt is a seller
26 of office technology products and related services, including Riso
27 duplicators. (Id.) Witt has been an authorized dealer of products
28 since approximately 1988. (Id.)

1 On April 1, 2011, the parties entered into an Asset Purchase
2 Agreement ("the Agreement"), under which Witt acquired seven of
3 RISO's markets in California and Arizona. (Id. at 4.) The
4 Agreement included an arbitration provision, which states, in
5 relevant part, "Except as provided in subsection (iii), any
6 controversy or claims arising out of or relating to this Agreement
7 shall be determined exclusively by binding arbitration"
8 (Agreement § 9.3, Compl. Ex. 5 at 34.) Subsection (iii) states:

9 Notwithstanding the binding arbitration provision of this
10 section 9.3, in the event of a breach, either Party shall
11 have the right to bring an action in any court of
12 competent jurisdiction for injunctive relief or remedy.
13 The filing of any such action or remedy will not waive
14 [RISO]'s or [Witt]'s right to compel arbitration under
15 this Section for other matters that are not the subject
16 of such action or remedy.

17 (Id.)

18 Subsequent to the execution of the Agreement, the parties
19 unsuccessfully attempted to negotiate a new Dealer Agreement.
20 (RISO I at 4.) Absent a new Dealer Agreement, and the Agreement
21 notwithstanding, RISO threatened to stop selling its products and
22 services to Witt after March 13, 2013. (Id., Compl. ¶¶ 10-11.)

23 On January 29, 2013, Witt filed a complaint ("the Oregon
24 action") against RISO in the United States District Court for the
25 District of Oregon. (Compl. ¶ 9.) Witt alleged that under the
26 Agreement, RISO was obligated to do business with Witt until April
27 2014. See Witt Co. v. RISO, Inc., 948 F.Supp.2d 1227, 1245 (D. Or.
28 2013). Witt therefore brought causes of action against RISO for
breach of the Agreement and breach of the duty of good faith and

1 fair dealing.¹ (*Id.*) Witt sought injunctive relief preventing
 2 RISO from terminating Witt's authorized dealer status. (Compl.,
 3 Ex. 1 at 20.) Witt also sought "all damages suffered by Witt
 4 company as a result of RISO's conduct" (*Id.*)

5 RISO moved to dismiss Witt's claims under Federal Rule of
 6 Civil Procedure 12(b)(6). Witt, 948 F.Supp.2d at 1246. On June 7,
 7 2013, the Oregon court granted RISO's motion and dismissed Witt's
 8 contract claims with prejudice. Witt, 948 F.Supp.2d at 1247-8.

9 On October 11, 2013, Witt filed a Demand for Arbitration
 10 before the American Arbitration Association, asserting claims for
 11 breach of the Agreement with respect to certain bonus payments and
 12 fraud in the inducement of the Agreement. (Compl., Ex. 5.) Witt's
 13 fraud in the inducement claim seeks rescission of the Agreement on
 14 the ground that Witt allegedly would not have entered into the
 15 Agreement had it known that RISO would not negotiate the terms of
 16 the Dealer Agreement in good faith and that RISO would terminate
 17 Witt's rights to sell RISO products in May of 2013. (*Id.* ¶ 22-28.)

18 On December 19, 2013, RISO filed the instant declaratory
 19 judgment action in this court. RISO seeks a declaratory judgment
 20 that Witt waived its rights to arbitrate the fraudulent inducement
 21 claim and is barred by res judicata, or collaterally estopped, from
 22 arbitrating the fraudulent inducement claim as a result of the
 23 Oregon action.²

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25 ¹ Witt also brought antitrust and intentional interference
 26 with economic relations claims which, the parties appear to agree,
 27 are not relevant here, as they did not arise out of or in
 connection with the Agreement.

28 ² RISO does not contend that Witt waived its right to
 arbitrate the breach of contract claim.

1 Witt now moves to compel arbitration of RISO's declaratory
2 judgment action and dismiss the Complaint.

3 **II. Legal Standard**

4 Although the instant Motion is styled as a Motion to Dismiss,
5 it is in effect a motion to compel RISO to arbitrate its
6 declaratory judgment action. Accordingly, the motion is
7 appropriately construed as a motion to compel arbitration.

8 The Federal Arbitration Act ("FAA") reflects a "federal policy
9 favoring arbitration agreements." Gilmer v. Interstate/Johnson Lane
10 Corp., 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Mem. Hosp. v.
11 Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). Under the FAA, 9
12 U.S.C. § 1 et seq., a written agreement that controversies between
13 the parties shall be settled by arbitration is "valid, irrevocable,
14 and enforceable, save upon such grounds as exist at law or in
15 equity for the revocation of any contract." 9 U.S.C. § 2.

16 A party aggrieved by the refusal of another to arbitrate under
17 a written arbitration agreement may petition the court for an order
18 directing that arbitration proceed as provided for in the
19 agreement. 9 U.S.C. § 4; see e.g. Stirlen v. Supercuts, Inc., 51
20 Cal.App.4th 1519, 1526-27 (1997). In considering a motion to compel
21 arbitration, the court must determine whether there is a duty to
22 arbitrate the controversy, and "this determination necessarily
23 requires the court to examine and, to a limited extent, construe
24 the underlying agreement." Stirlen, 51 Cal.App.4th at 1527. The
25 determination of the validity of an arbitration clause is solely a
26 judicial function. Id. (internal citation omitted). If the court is
27 satisfied that the making of the arbitration agreement or the
28 failure to comply with the agreement is not at issue, the court

1 shall order the parties to proceed to arbitration in accordance
2 with the terms of the agreement. 9 U.S.C. § 3.

3 **III. Discussion**

4 A. Whether This Court Or The Arbitrator Should Decide Waiver
5 A key issue in this case, and in this motion, is whether Witt
6 waived its right to arbitrate its fraudulent inducement claim by
7 filing the Oregon action. Witt first argues that the waiver
8 question must be addressed by the arbitrator, and not by this
9 court.

10 In Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002),
11 the Supreme Court explained that "questions of arbitrability," such
12 as what parties are bound by an arbitration agreement or the
13 application of an agreement to particular controversy, should
14 generally be decided by a court. Howsam, 537 U.S. at 84.
15 Procedural questions, on the other hand, are presumptively for an
16 arbitrator to decide. Id. Such procedural questions include
17 allegations of waiver. Id.

18 Several circuits, however, have interpreted "Howsam's use of
19 the term 'waiver' as referring not to conduct-based waiver, but to
20 a defense arising from non-compliance with contractual conditions
21 precedent to arbitration." Grigsby & Assoc., Inc. v. M. Securities
22 Investment, 664 F.3d 1350, 1353 (11th Cir. 2011) (internal
23 quotation and citations omitted); see also JPD, Inc. v. Chronimed
24 Holdings, Inc., 539 F.3d 388, 393-94 (6th Cir. 2008); Ehleiter v.
25 Grapetree Shores, Inc., 482 F.3d 207, 217-19 (3d Cir. 2007); Marie
26 v. Allied Home Mortg. Corp., 402 F.3d 1, 12-14 (1st Cir. 2005); In
27 re Toyota Motor Corp. Prods. Liability Litigation; 838 F.Supp.2d
28 967 (C.D. Cal. 2012). Thus, these courts have concluded that

1 waiver remains a court issue insofar as it is premised upon the
 2 conduct of the party seeking to arbitrate. See In re Toyota, 838
 3 F.Supp.3d at 975 (discussing cases); but see Nat'l Am. Ins. Co. v.
 4 Transamerica Occidental Life Ins. Co., 328 F.3d 462, 466 (8th Cir.
 5 2003) (holding conduct-based waiver to be an issue for an
 6 arbitrator). The Ninth Circuit has implicitly agreed with this
 7 approach to Howsam, noting that "to treat breach and waiver as
 8 procedural issues for the arbitrator . . . would create a strange
 9 result: the arbitrator would get first crack at defenses to a
 10 motion to compel arbitration based on waiver or breach. In
 11 essence, the court would have to compel arbitration without
 12 reviewing the parties' contentions." Cox v. Ocean View Hotel
 13 Corp., 533 F.3d 1114, 1121 n.5 (9th Cir. 2008). It is, therefore,
 14 for this court to decide whether Witt's litigation conduct in
 15 Oregon constitutes a waiver of its right to arbitrate the
 16 fraudulent inducement claim.³

17 B. Whether Witt Waived Its Right To Arbitrate

18 "To demonstrate waiver of the right to arbitrate, a party must
 19 show: '(1) knowledge of an existing right to compel arbitration;
 20 (2) acts inconsistent with that existing right; and (3) prejudice
 21 to the party opposing arbitration resulting from such inconsistent
 22 acts.'" In re Toyota, 838 F.Supp.3d at 976 (citing United States
 23 v. Park Place Assoc., Ltd., 563 F.3d 907, 921 (9th Cir. 2009)).

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26 ³ Were Witt correct in its assertion that conduct constituting
 27 waiver must occur before the same court deciding waiver (Reply at
 28 4), the Oregon court, not the arbitrator, would be the proper
 decision maker. Neither party has sought to transfer this case to
 the District of Oregon.

1 Here, Witt does not dispute that it had knowledge of its right
2 to compel arbitration at the time it filed the Oregon action.
3 Indeed, Witt pursued that right soon after its claims in the Oregon
4 action were dismissed. Witt primarily argues, rather, that its
5 actions in the Oregon action were not inconsistent with its
6 arbitration rights.

7 The Agreement's arbitration provision states that "either
8 Party shall have the right to bring an action in any court of
9 competent jurisdiction for injunctive relief or remedy. The filing
10 of any such action or remedy will not waive [RISO]'s or [Witt]'s
11 right to compel arbitration." (Agreement § 9.3(iii) (emphases
12 added). As relevant here, Witt's Oregon complaint sought
13 injunctive relief on Witt's causes of action for breach of contract
14 and breach of the duty of covenant of good faith and fair dealing.
15 Witt also, however, sought "all damages suffered by Witt company as
16 a result of RISO's conduct"

17 Witt argues that it "primarily sought to enjoin RISO from
18 terminating Witt [] as an authorized dealer." (Reply at 7.) Witt
19 further argues that the Agreement does not prohibit parties from
20 seeking damages that are "incidental, or in addition to, a claim
21 for injunctive relief." Id. Witt's argument conflicts with the
22 plain language of the agreement. The Agreement states that all
23 Agreement-related claims, other than those carved out by subsection
24 (iii), must be arbitrated. Subsection (iii) carves out only
25 actions for injunctive relief or remedy. Nothing in the language
26 of the Agreement suggests that either party may litigate other
27 claims "in addition to" permissible injunctive relief claims. Witt
28 does not dispute RISO's repeated assertions that the damages sought

1 in the Oregon action numbered in the millions of dollars. (Opp. at
2 1, 4, 5, 10.) Such damages can hardly be considered "incidental"
3 to Witt's injunctive relief claims. Witt's pursuit of millions of
4 dollars in damages was inconsistent with its obligation to
5 arbitrate all claims other than those for injunctive relief.

6 Though Witt does not expressly address the effect of its
7 actions on RISO, Witt's attempt to take the two bites at the apple
8 has prejudiced RISO. First, Witt ignored the mandatory language of
9 the arbitration provision and forced RISO to defend against claims
10 for millions of dollars in damages in federal court. Only after
11 RISO prevailed, and once Witt's claims were dismissed with
12 prejudice, did Witt then attempt to unring the bell and pursue
13 arbitration. Notably, Witt did not seek to rescind the Agreement,
14 as it does now in the arbitration action, but rather to enforce its
15 reading of it. Had Witt prevailed, obtained injunctive relief, and
16 recovered its damages, it almost certainly would not have sought to
17 rescind the Agreement in arbitration. As a result of Witt's
18 inconsistent actions, which appear to be motivated in substantial
19 part by Witt's defeat in the Oregon action, RISO has not only been
20 forced to defend the Oregon action in court rather than in
21 arbitration, but now must either also defend against the
22 arbitration claim or prevail in this affirmative suit.

23 Witt's decision to seek millions of dollars in damages in
24 federal court, contrary to the mandatory arbitration provision of
25 the Agreement, cannot be reconciled with its current attempt to
26 rescind the Agreement through arbitration proceedings.⁴ Witt's

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28 ⁴ Witt contends that the Oregon action could not preclude
(continued...)

1 earlier conduct in the Oregon action, which has prejudiced RISO,
2 constitutes waiver of Witt's right to arbitrate its fraudulent
3 inducement claim.

4 **IV. Conclusion**

5 For the reasons stated above, Witt's Motion to Compel
6 Arbitration is DENIED.⁵

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IT IS SO ORDERED.

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Dated: September 16, 2014

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⁴(...continued)
arbitration of Witt's fraudulent inducement claim because Section III of the Agreement states that the filing of an injunctive relief action does not operate as a waiver of other, arbitrable claims. As described above, however, the Oregon action sought both injunctive relief and significant monetary damages.

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⁵ Though the parties devote much of their attention to res judicata issues, which form the core of RISO's affirmative claim for declaratory relief, such issues are not necessary to the disposition of the instant motion. The court, therefore, does not address those ultimate issues here.



DEAN D. PREGERSON
United States District Judge